

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 02-145
Competition in the Market for the)	
Delivery of Video Programming)	

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

Gregory L. Klein
Senior Director
Economic & Policy Analysis

Daniel L. Brenner
Michael S. Schooler
Loretta P. Polk
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903
(202) 775-3664

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The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

As in past years, the Commission’s ninth annual inquiry on the status of competition in the market for the delivery of video programming has provided a platform for cable’s competitors to promote a regulatory agenda. In an effort to obtain an artificial boost from the government, satellite providers and broadband overbuilders attempt to portray the video marketplace as virtually unchanged in the past six years. And they resort to sweeping assertions: cable has market power, is circumventing the program access rules, is engaging in predatory pricing, and is impeding competitive entry with exclusive contracts in multiple dwelling units (“MDUs”). Beyond demonstrating a strong desire to grow their already dramatically increased share as multi-channel video programming distributors (“MVPDs”), they offer no concrete evidence of anti-competitive behavior by cable companies to warrant further regulatory intervention in the video marketplace.

These competitor bromides cannot obscure the key facts of this ninth annual assessment: cable companies face formidable competition in the video marketplace; cable has gone from a 95

percent share of multi-channel video subscribers in 1992 to a 76 percent share today; DBS has grown from virtually no customers to over 18 million customers in eight years; and more than 22.27 million households choose a multi-channel video programming provider other than their local cable operator -- an increase of nearly 2.3 million customers over last year.¹ Indeed, none of cable's competitors provides a credible rebuttal to the fact that highly viable, fully substitutable alternatives to cable are available today and that video competition has firmly taken hold nationwide.

Nor can they take issue with a record that shows that the cable industry competes not only with multiple providers of multi-channel video services but an ever-stronger home video retail industry, buoyed by rapidly growing consumer demand for DVDs.² And no one disputes that cable companies compete fiercely with broadcasters for viewers and advertising revenue at the national and local level.³

In these circumstances, there is no reason for the Commission to recommend regulatory changes or to modify rules to benefit one provider over another. This would distort rather than enhance video competition. The Commission has taken steps, most recently in extending program access regulation for five more years, where it concluded such action is necessary to promote diversity in the distribution of video programming. But it should not skew the competitive marketplace by recommending to Congress other changes -- such as more expansive program access regulation or a ban on exclusive contracts in MDUs -- where there is no basis for such action.

¹ Comments of NCTA at 12-22; Comments of Comcast Corporation at 8-11; Comments of AT&T Corp. at 4-13.

² Comments of NCTA at 22-24.

³ Comments of AT&T Corp. at 10-13.

NCTA urges the Commission to declare that video competition has arrived and that cable's share of multi-channel video subscribers does not and cannot amount to "dominance" in the dynamic, diverse video programming marketplace.

I. CABLE'S SHARE OF MULTICHANNEL VIDEO CUSTOMERS AND ITS PRICING OF CABLE SERVICES DOES NOT INDICATE MARKET POWER

EchoStar Satellite Corporation -- now the 5th largest U.S. MVPD and growing at a rate of 23 percent a year -- argues that cable companies are maintaining their "immense market power" through "consolidation, clustering, digital and broadband bundling, and, in some cases, the outright refusal of its affiliates to sell programming to competitors."⁴ It asserts that only through the combined resources of the two major DBS providers, EchoStar and DirecTV, will the DBS industry be able to compete effectively in the future against cable."⁵

EchoStar further asserts that by any indicator -- market share, pricing behavior, market foreclosure -- cable companies have retained their "dominant position."⁶ But this easy rhetoric deserves closer analysis -- something altogether lacking in EchoStar's filing. For example, EchoStar points out that the FCC's April 2002 Report on Cable Industry Prices concluded that cable prices rose 7.5 percent during the 12-month period ending on July 1, 2001 and, by comparison, the Consumer Price Index increased by 2.7 percent during that same period. "Such price increases far outpacing inflation," EchoStar argues, "are also suggestive of the cable industry's ability to exercise significant market power."⁷

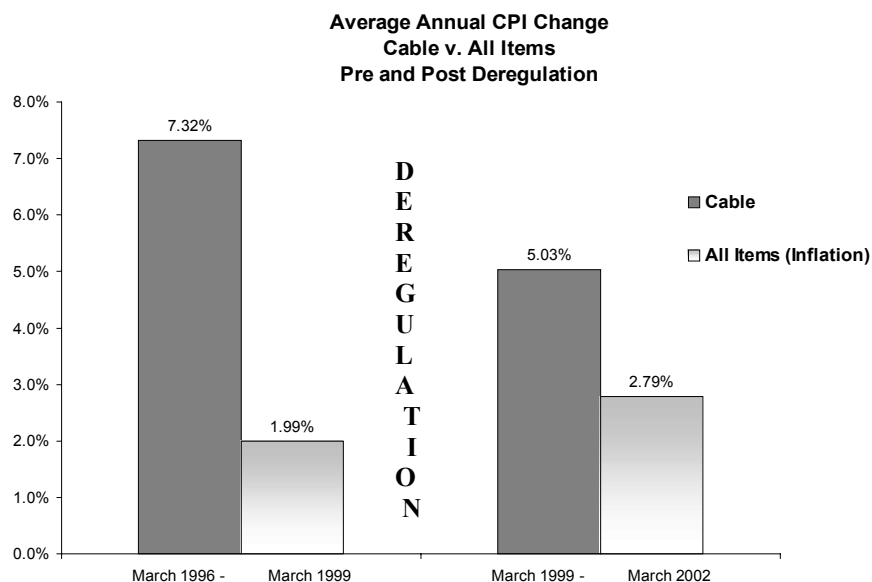
⁴ Comments of EchoStar at 1.

⁵ Id. at 2.

⁶ Id.

⁷ Id. at 3.

But since cable prices were deregulated in March 1999, price increases have exceeded the rate of inflation only by about two percent a year. Cable prices have in fact grown at a slower pace in the three years since deregulation (1999-2002) than they did in the three years prior to deregulation (1996-1999). This occurred in spite of spiraling input costs. In addition, data included in the FCC's April 2002 Annual Report on Cable Industry Prices indicate that the price per channel of cable's video services declined over the last year when adjusted for inflation.



EchoStar also cites a recent paper by Consumers Union (“CU”) that argues that cable’s market power resulted “in an increase of 45%, nearly three times the rate of inflation, in cable rates since the passage of the 1996 Telecommunications Act.”⁸ For over a decade, CU has complained that the price of cable service is too high and exceeds its value to consumers. However, as cable operators have offered a better and better product, more and more customers

⁸ Id at 1-2.

have purchased their systems' packages of services.⁹ CU simply refuses to recognize that cable has faced increased competition from DBS and other broadband providers since the 1996 Telecommunications Act, and that this competition has spurred cable's dramatic investment in a new infrastructure and enhanced service offerings to consumers. As demonstrated in our initial comments, the cable industry has spent tens of billions developing that upgraded infrastructure.¹⁰ This investment has brought consumers a host of new advanced services, such as digital cable, high-speed Internet access, and cable telephony.¹¹ Consumer acceptance of these new services has slowed the rate of price inflation on traditional cable service. Today 16.8 million consumers have purchased digital cable service, over 9 million purchased cable modem service and more than 2 million purchased cable telephony.¹²

It is undisputed that cable operators offer consumers a superior product today as compared to six years ago. As NCTA's initial comments described, the increase in the number

⁹ At the end of 2001, for example, nearly 21% of U.S. cable customers – or 15.2 million customers – received digital cable packages.

¹⁰ See Comments of NCTA at 25-26.

¹¹ In its initial comments, NCTA mistakenly referred to cable broadband service as being available to “more than 75 million cable subscribers” according to a year-end 2001 study prepared by Morgan Stanley. This language should read “more than 75 million homes passed.” Similarly, the description of a Morgan Stanley projection saying that cable modem service will be available to more than “100 million cable subscribers” by the end of 2005 should read “100 million homes passed.” See Comments of NCTA at 27-28.

¹² NCTA research based on company data. The ability to offer voice, data and video services over the same facilities has expanded the range of “multi-service” competitors to cable. Cable operators now face vigorous competition not only from other providers of video programming but also from telephone companies providing local telephone service and DSL high-speed Internet access. In large part because telephone companies failed to develop and offer DSL service until cable operators deployed and demonstrated the demand for high-speed cable modem service, cable modem service is well ahead of DSL in serving residential subscribers. But the magnitude of this head start has been exaggerated by SBC and others who, in other proceedings and elsewhere, have suggested that cable modem service has upwards of 70% of high-speed Internet subscribers. According to the FCC's most recent data on high-speed services for Internet access, cable has 64% of the “residential and small business high-speed lines and only 55% of all high-speed lines.” The data also shows that telephone companies have narrowed the gap in both the overall high-speed market as well as in the residential and small business high-speed market. Compare SBC Telecommunications, Inc., *Ex parte*, filed in CC Docket Nos. 96-45; 96-98; 98-146; 98-147; 99-200; 99-217; 00-199; 01-92; 01-318; 01-321; 01-337; 01-338; 02-33; 02-52 to “High-Speed Services for Internet Access: Status as of December 31, 2001,” Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, July 2002, at 5-6.

and quality of programming service is marked by rising cost.¹³ Between 1996 and 2001, programming costs incurred by cable operators amounted to \$46 billion, which is approximately 92 percent more than the \$24 billion spent during the previous six years.¹⁴ In 1986, cable operators spent roughly \$2 billion on basic and premium programming while, last year, cable systems spent almost \$10 billion dollars. In 1996, cable programmers invested less than \$3.7 billion, while this year alone programmers will invest nearly \$9.2 billion.¹⁵

Furthermore, the proposition that because cable retains the largest share of multi-channel video customers, it does not yet face effective competition and exercises market power in the video marketplace, is highly flawed.¹⁶ Dr. Debra J. Aron discussed this faulty analysis in her paper attached to NCTA's initial comments. Shares are not a reliable indicator of market power where, as here, an incumbent initially served almost all MVPD subscribers, but faces rapidly growing competitors that, once launched, have virtually no barrier to expansion and can serve additional subscribers nationwide without substantial incremental costs.¹⁷ And Professor Aron's analysis showed that there is no basis for assuming that the rate at which prices increase has anything to do with market power.

¹³ Comments of NCTA at 29-35, 37-38.

¹⁴ NCTA, 2002 Cable Developments, at 14.

¹⁵ Kagan World Media, Cable Program Investor, May 10, 2002 at 7.

¹⁶ The Broadband Service Providers Association seems to need to inflate the numbers to make its case. It wrongly asserts that cable has "an 87% share of MVPD subscribers nationwide" citing to the Commission's Eighth Annual Report. But this was cable's share of multi-channel subscribers *five years ago* in June 1997. Comments of Broadband Service Providers Association at 9. In fact, the Eighth Annual Report figure was 78%, and, as we have seen, cable's share of multi-channel subscribers has declined to 76% today. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket, Eighth Annual Report, 17 FCC Rcd 1244, Appendix C (2002) ("*Eighth Annual Report*").

¹⁷ Comments of NCTA at 2, 6-11; Statement of Dr. Debra J. Aron, Director, LECG and Professor, Communications Systems, Northwestern University, Appendix A.

EchoStar attempts to make the case that approval of its merger request is necessary to compete with cable, but it concedes that today “the addition of local channels has made DBS more competitive with the incumbent cable providers. Indeed, the introduction of local service has led to an increase in DBS subscribership *and* a restraint on cable prices.”¹⁸ While NCTA takes no view on EchoStar’s merger aspirations, DBS’s dramatic growth and the consequent effect on cable prices is one of the hallmarks of the now well-established competitive video marketplace.

II. THERE IS NO LEGAL OR POLICY BASIS FOR EXPANDING THE SCOPE OF THE PROGRAM ACCESS RULES TO ENCOMPASS TERRESTRIALLY-DELIVERED PROGRAMMING

The Broadband Service Providers Association (“BSPA”), DirecTV, EchoStar, and the Satellite Broadcasting and Communications Association (“SBCA”) urge the FCC to close a supposed “terrestrial loophole” in the program access rules.¹⁹ They seek mandatory access to vertically-integrated programming delivered by terrestrial, rather than satellite, means. But there is no such omission in the law. As shown below, Congress never intended to require cable operators to share all the programming that they owned with DBS operators and other competing multi-channel video programming distributors. It deliberately limited the access requirement to programming that is satellite-delivered. Congress expected -- correctly -- that guaranteed access to that programming would be sufficient to jump-start and ensure the viability of competition. Requiring all cable-owned programming, including terrestrially-delivered programming, to be shared with competitors would simply remove incentives to invest in and develop new local and regional programming.

¹⁸ Comments of EchoStar at 5 (emphasis in original).

¹⁹ Comments of BSPA at 11-16; Direct TV at 9-11; EchoStar at 9-11; SBCA at 16-18; see also Utilicorp et al. at 9.

In its recent decision to retain the ban on exclusive programming contracts in the program access “sunset” proceeding, the Commission specifically rejected proposals to expand the scope of the program access rules to include terrestrially-delivered programming and non-vertically integrated programming.²⁰ The Commission concluded

the language of Section 628(c) expressly applies to “satellite cable programming and satellite broadcast programming,” and that terrestrially delivered programming is “outside of the direct coverage of Section 628 (c).” We have been presented with no basis to alter that conclusion in this proceeding. To the contrary, the legislative history to Section 628 reinforces our conclusion.²¹

The Commission went on to explain that the Senate version of the program access legislation was more expansive than the House version. The Senate bill would have applied the program access provisions that became section 628 to all “national and regional cable programmers who are affiliated with cable operators.”²² By contrast, the House version, which was adopted in conference with amendments, expressly limited the provisions to “satellite cable programming vendor[s] affiliated with a cable operator.”²³ The Commission concluded, therefore, that

given this express decision by Congress to limit the scope of the program access provisions to satellite delivered programming, we continue to believe that the statute is specific in that it applies only to satellite delivered cable and broadcast programming.²⁴

²⁰ Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: § 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition, FCC 02-176, CS Docket No. 01-290, (rel. June 28, 2002) (“Report and Order”).

²¹ Id. at ¶ 73 (emphasis supplied).

²² See Report of Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, at 121 (1991).

²³ See H.R. Conf. Rep. No. 102-862, 102nd Cong., 2nd Sess. at 91-3 (1992) (emphasis added).

²⁴ Report and Order at ¶ 73. See INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend to enact statutory language that it has earlier discarded in favor of other language.”); Tanner v. United States, 483 U.S. 107, 125 (1987) (“[T]he legislative history demonstrates with uncommon clarity that Congress specifically understood, considered and rejected” other language.)

Nevertheless, the FCC has ruled that even programming delivered by terrestrial means might be subject to the access requirement if it is taken off the satellite and delivered terrestrially in order to evade the requirement. DirecTV, EchoStar and others charge that cable operators are currently engaging in such evasive behavior.²⁵ But they provide no evidence that any cable-owned services are being delivered terrestrially for evasive purposes rather than for legitimate business reasons. Indeed, the Commission has repeatedly examined these complaints in the specific context of terrestrial delivery of cable-owned sports networks and concluded there was no evasion of the program access rules -- and the United States Court of Appeals for the District of Columbia Circuit has agreed.²⁶

In considering complaints alleging “evasion,” the Media (then Cable Services) Bureau looked at the “totality of the circumstances,” including “unchallenged cost advantages of terrestrial distribution,” and concluded that evasive conduct was not involved.²⁷ On review, the full Commission determined that the operator “employed terrestrial distribution for legitimate business means” because terrestrial distribution of the sports network is “dramatically less expensive” than satellite distribution.²⁸ The cost to launch this service -- which the FCC found to be a new, substantially different service from the satellite service that had previously distributed sports programming in Philadelphia -- via satellite, using a satellite transponder or

²⁵ See Comments of Direct TV at 9-10, EchoStar at 9-11.

²⁶ See DirecTV, Inc. v. Comcast Corporation, 15 FCC Rcd 22802, 22807 (2000), aff’d, EchoStar Communications Corporation v. Comcast Corporation, 14 FCC Rcd 2089 (1999), DirecTV, Inc. v. Comcast Corporation, 13 FCC Rcd 21822 (1998), aff’d sub nom. EchoStar Communications Corporation v. FCC, 292 F.3d 749 (D.C. Cir. 2002); RCN Telecom Services on New York, Inc. v. Cablevision Systems Corp., 16 FCC Rcd 12048 (2001).

²⁷ DirecTV, Inc. v. Comcast Corporation, Memorandum Opinion and Order, 13 F.C.C. Rcd 21822, 21837 (1998). See also EchoStar Communications Corporation v. Comcast Corporation, 14 FCC Rcd 2089 (1999).

²⁸ DirecTV, Inc. v. Comcast Corporation and EchoStar v. Comcast Corporation, Application for review of Orders of the Cable Services Bureau Denying Program Access Complaints, Memorandum Opinion and Order, 15 F.C.C. Rcd 22802 (2000).

even a shared digital capacity would involve substantial costs on top of the up-front uplink facility and annual uplink costs.

Limiting the program access requirements to satellite-delivered programming incents cable operators to invest in the development of local and regional cable programming, which is often most economically delivered by terrestrial means.²⁹ Exclusivity is, in these circumstances, a pro-competitive tool that provides incentives for cable operators to invest in local and regional programming, to the benefit of cable customers.

These rules have worked just this way. There are now approximately 22 local and regional cable-created networks devoted solely to news and public affairs programming.

For example, in March 2002, Time Warner Cable launched News 14 Carolina covering the Raleigh/Durham, Greensboro, Fayetteville area of North Carolina.³⁰ News 14 offers 24-hour local news with weather every 10 minutes, allowing viewers more choice on when to get their local news. Providing continually updated unique local content, the network's news director sees the channel as "an opportunity to cover ground the other stations are not covering."³¹ It is estimated that it takes \$10 to \$11 million to launch a regional cable news network, and another

²⁹ Even satellite-delivered local programming services have been granted the right to enter into exclusivity arrangements under the program access rules in light of the public interest benefits of exclusive distribution. In a case involving New England Cable News, a 24-hour satellite-delivered regional news service, the FCC authorized NECN to enter into exclusive program distribution agreements with cable system affiliates under the public interest exemption in section 628 because it found that exclusivity was required to attract and secure capital investment and promotion to ensure its financial viability and that this would in turn foster diversity in the programming market. New England Cable News, Petition for Public Interest Determination Under 47 C.F.R. section 76.1002(c)(4) relating to Exclusive Distribution of New England Cable News, Memorandum Opinion and Order, 9 F.C.C. Rcd 3231 (1994). See also NewsChannel, Petition for Public Interest Determination Under 47 C.F.R. section 76.1002(c)(4) Relating to Exclusive Distribution of NewsChannel, Memorandum Opinion and Order, 10 F.C.C. Rcd 691 (1994).

³⁰ "Triangle gets its own CNN," The News and Observer (Raleigh, NC), March 17, 2002; "All News, All the Time," Greensboro News & Record, August 4, 2002.

³¹ Id.

\$10 million a year to operate it.³² This is Time Warner's sixth local news service, with at least two more local news services to be introduced this year in Charlotte, North Carolina, and Albany, New York.

New England Cable News ("NECN"), which covers Massachusetts, Maine, Connecticut, New Hampshire, Rhode Island, and Vermont, recently celebrated its 10th anniversary. In contrast to other local news outlets, AT&T Broadband's regional news network has emphasized more in-depth stories instead of fast-paced newscasts, hired veteran anchors, and produced documentaries on local issues.³³ And it has been recognized for its live coverage of local political races, including debates, and daily business reports and other financial news information. In April of this year, it won the Massachusetts and Rhode Island Associated Press News Station of the Year Award for consistent excellence in news programming.³⁴ NECN, which now reaches approximately 2.8 million cable customers in more than 700 communities, has plans to open new bureaus, double its reporting staff, expand its investigative and documentary units, and begin carrying opinion pieces.³⁵

Rainbow Media Holdings, Inc, a division of Cablevision Systems Corporation, received a breathtaking 93 New York Emmy nominations in 2002 -- more than any other local programming company -- for its three regional services, MSG Networks, News 12 Networks, and MetroChannels (covering New York, Connecticut, New Jersey).³⁶ News 12 Networks, which includes 5 independent news channels, reach more than 3.2 million homes in the New

³² Id.

³³ "Cable News Station Turns 10 With A Sense of Patience," The Boston Globe, April 14, 2002.

³⁴ Id.

³⁵ Id.

³⁶ "Rainbow Media's MSG Networks, News 12 Networks and MetroChannels Nominated for 93 Emmy's," Business Wire, March 12, 2002.

York tri-state area. MetroChannels provides a suite of networks containing a wide range of “hyper-local” information geared entirely to the experience of living in the New York metropolitan area. This service includes not only 24-hour local news, weather and traffic information but entertainment, sports, history and lifestyle programs.

CN8, The Comcast Network, offers approximately four million viewers in Pennsylvania, New Jersey, Delaware, and Maryland 24-hour local news, sports, talk, and entertainment programming. Comcast created this service six years ago as an information resource that would address local, regional and national issues, while giving community members a forum to air their viewpoints. Its live, interactive nature sets it apart from other local news outlets. This month, CN8 garnered 49 2002 Mid-Atlantic Emmy nominations -- more than any other cable or broadcast network.³⁷

This type of programming innovation is being offered on cable systems, produced by cable operators or in partnership with broadcasters and others, all over the country. Here is just a partial list of other local and regional cable news networks and public affairs programming services:

- Central Florida News 13 (Orlando, FL), a 50/50 partnership between Time Warner Cable and The Orlando Sentinel, delivers continuous half-hour newscasts 24 hours a day.
- Bay News 9 (Tampa Bay, FL) offers 24-hour news.

³⁷ “CN8, The Comcast Network Garners a Record 49 2002 Mid-Atlantic Emmy Nominations; six-Year-Old Network Leads With Most Nominations of Any Network,” PR Newswire, August 14, 2002; “CN8, WTXF top nominee list for news coverage awards,” The Philadelphia Inquirer, August 14, 2002. In Florida, cable news channels, Bay News 9 of Pinellas Park and Central Florida News 13, took top honors this year from the Florida Associated Press Broadcasters. Associated Press Newswires, April 20, 2002.

- New York 1 News employs more than 25 full-time reporters to provide 24-hour news coverage of New York City's five boroughs and northern New Jersey.
- The California Channel – public affairs programming network, including gavel-to-gavel California Assembly and Senate floor sessions and committee meetings; capitol press conferences and proceedings of regulatory board and state commissions.
- Chicagoland Television News (Chicago, IL, and its suburbs; Northwest Indiana) – provides local news and information.
- County Television Network San Diego (San Diego County, CA) – informational programming on services, programs and current issues in the San Diego County government.
- Michigan Government Television (Michigan) – information channel covering all branches of Michigan state government, including Senate sessions, and the Michigan Supreme Court.
- News 12 Bronx, News 12 Connecticut, News 12 Long Island, News 12 New Jersey, News 12 Westchester – 24-hour news services.
- News 8 Austin (Austin, TX) – 24-hour news channel.
- Newschannel 8 (Washington, D.C., Maryland, Northern Virginia) - 24-hour news covering metropolitan area.
- Northwest Cable News (Washington, Oregon, Idaho, Montana and Alaska) – 24-hour news.
- Ohio News Network – 24-hour news.

- Pennsylvania Cable Network – public affairs network with live and same-day coverage of Pennsylvania Senate, House, and other governmental branches; state events; educational programming.
- Pittsburgh Cable News Channel (Pittsburgh metropolitan area) – news channel.
- Texas Cable News – 24-hour news coverage.

The ability to provide local news and information has enabled cable operators to enhance their local identity and distinguish their service from other multi-channel video service offerings -- as Congress intended. It has spawned associated scores of local web-sites that organize information in new, locally-formatted ways, adding to a sense of community.

Exclusivity is not a cable-only idea either. Satellite providers have, themselves, used exclusivity as a means of competing with cable operators and with each other. For example, DirecTV's NFL football package is not available to cable operators. Moreover, the two principal DBS operators are as large or larger than some of the vertically-integrated cable multiple system operators and have the resources and subscriber base to develop their own basic and/or premium programming, both for their own use and for sale to other MVPDs. But, they have yet to do so, preferring, instead, to rely on -- and seek expansion of -- the regulatory guarantee of access to cable-owned programming. DBS and other providers need no further guaranteed access to programming to compete effectively with cable companies. Such benefaction only removes operator incentive to continue to develop unique programming services while ensuring that its competitors continue not to develop such programming.

III. THE COMMISSION SHOULD NOT ABROGATE EXISTING EXCLUSIVE CONTRACTS IN MULTI-DWELLING UNITS NOR RESTRICT FUTURE EXCLUSIVE CONTRACTS

Several of cable's competitors argue that exclusive contracts in some multi-dwelling units ("MDUs") impede their ability to compete with incumbent cable operators.³⁸ They want the Commission to prohibit cable operators from entering into new long-term exclusive arrangements and to take a "fresh look" at existing exclusive contracts.

These same issues are being addressed by the Commission in its pending cable inside wiring proceeding.³⁹ As NCTA has argued in that proceeding, two overriding principles should guide the Commission in addressing exclusivity in MDUs.⁴⁰ First, as a matter of law, the Commission may not abrogate existing contracts unless it has a clear statutory mandate or authorization to do so. Nothing in the Communications Act directs or authorizes the Commission to invalidate the terms of existing MDU contracts.⁴¹ Nor may it authorize another party to abrogate existing contracts, for example, via a "fresh look" mechanism.

Second, if the Commission were to decide to impose restrictions on exclusive contracts in the future, any such restrictions should apply to all MVPDs on a nondiscriminatory basis. There is, for example, no basis in law or public policy to allow alternative providers to obtain exclusivity while prohibiting incumbents from doing so. To permit some providers but not others to negotiate for exclusivity would artificially and unfairly skew competition among

³⁸ Comments of BSPA at 16-17; Comments of Utilicorp Corporation et al. at 6-7; see also Comments of DirecTV at 19.

³⁹ Second Further Notice of Proposed Rulemaking, Telecommunications Services Inside Wiring, Customer Premises Equipment, Cable Home Wiring, CS Docket No. 95-184, MM Docket No. 92-260.

⁴⁰ Id. Comments of NCTA, filed December 23, 1997.

⁴¹ As a general matter, "[t]he Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act

MVPDs. MDU residents would be less likely to be served by the provider that can most efficiently meet their needs and demands. Congress has signaled its desire to increase MDU competition, not make it one-sided. In the 1996 Telecommunications Act, it removed artificial advantages for alternative providers of service to MDUs when it removed special burdens on incumbent MDU cable provider pricing.⁴²

Tilting the playing field in order to give a competitive advantage to certain providers protects those competitors but disserves competition. The Commission should not, therefore, single out incumbent cable operators and preclude them from negotiating exclusive MDU contracts.

IV. CABLE IS A COMPETITIVE ALTERNATIVE TO DBS IN RURAL COMMUNITIES

The National Rural Telecommunications Cooperative (“NRTC”) again challenges the statistics on the number of “homes passed” by cable systems relied on by the Commission in evaluating the state of multi-channel video competition. In the Eighth Annual Report, the Commission concluded (based on data from Paul Kagan Associates) that homes passed by cable as a percentage of TV households was 97.1% as of June 2001.⁴³ NRTC argues that this number “inflat[es] the homes passed rate by *overcounting* the numerator (the number of “homes passed”) while simultaneously *undercounting* the denominator (the universe of homes for comparison

‘imperatively require’ that [a court] imply such authorization.” Bell Telephone Co. of Pa. v. FCC, 503 F.2d 1250, 1280 (3rd Cir. 1974).

⁴² Congress amended the “uniform rate” requirement of section 623, which had previously required franchised cable operators to charge MDU subscribers the same rates that they charged other subscribers in the franchise area, even though cable operators often face competition in MDUs from other MVPDs. As amended, Section 623 now permits cable operators to offer different bulk discounts to different MDUs so long as the discounts are not “predatory.” 47 U.S.C. § 623(d).

⁴³ Annual Assessment of Competition in the Market for the Delivery of Video Programming, 17 FCC Rcd 1244, Eighth Annual Report at ¶ 17, Appendix B (2002).

purposes).”⁴⁴ It argues that “housing units” (which would lead to the larger denominator) - - not television households -- is the most useful basis for determining the percentage of homes passed by cable. And it asserts, in the context of opposing the DirecTV-EchoStar merger proposal, that the national homes passed rate would be as low as 78%⁴⁵, using the bigger denominator and a numerator, based on non-Kagan, non-Nielsen sources.

NCTA does, in fact, use the number for total “TV Households” as the denominator in deriving the percentage of homes passed by cable. And it is, of course, true that to the extent that there are households with no television sets that are passed by cable, the percentage of *all* “housing units” passed by cable will necessarily be lower than the percentage of *television* households passed by cable.

But there is nothing unreasonable or misleading about using television households as the relevant basis, which has been followed by the FCC for years. And NRTC’s follow-on suggestion that there is a large portion of rural America that is likely to be unserved by cable now or in the near future is simply untrue. As we have pointed out in past filings, the cable industry’s roots are in rural America, owing to the dearth of off-air signals there. Despite the higher cost to build-out to areas with a low density of homes, the cable industry has been committed to providing cable service to such areas where economically feasible. And, over the years, advancements in technology has made it more and more feasible to serve ever lower-density communities.

Putting aside the question of the *percentage* of households passed (which is a dispute about whether or not to rely, as NCTA has for years, on Nielsen/Kagan data for the numerator), there can be no dispute that the number of households passed by cable systems exceeds 100

⁴⁴ Comments of NRTC at 5 (emphasis in original).

million -- and the number continues to increase. According to Nielsen Media Research, as of August 15, 2002, there were 8,763 cable headends which report data in terms of homes passed.⁴⁶ These headends provide cable service that passes a total of 88,446,838 homes. Moreover, there are additional 3,324 cable headends for which Nielsen does not have any “homes passed” data. These 3,324 systems serve 12,491,842 subscribers. Even assuming that there are no additional homes passed except for those accounting for the 12+ million subscribers, total homes passed for the industry would exceed 100 million (88.45 million + 12.49 million). And it is reasonable to assume there are more homes passed in the latter group that subscribe to cable.

As NCTA has documented in the Commission’s Section 706 inquiry and in other proceedings, the cable industry is rapidly deploying broadband services in rural areas, including some of the nation’s smallest towns.⁴⁷ There may be pockets of unpassed households where cable service is unavailable but they are a declining group. The evidence shows that most households, in both rural and more densely populated areas, have a choice among providers of multi-channel video programming.

⁴⁵ Id

⁴⁶ Nielsen Media Research, FOCUS database of cable system data, August 15, 2002.

⁴⁷ See e.g. Deployment of Broadband Networks and Advanced Telecommunications, National Telecommunications and Information Administration, Docket No. 011109273-1273-01, Comments of NCTA at 20-21, filed December 19, 2001; Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion (Section 706), CC Docket No. 98-146, Comments of NCTA, filed March 20, 2000.

CONCLUSION

For the foregoing reasons, the Commission should report to Congress that the market for the delivery of video programming is highly competitive, cable cannot be considered “dominant” and that further legislative or regulatory intervention would disserve consumers and undermine the pro-competitive goals of the Telecommunications Act.

Respectfully submitted,

/s/ Daniel L. Brenner

Gregory L. Klein
Senior Director
Economic & Policy Analysis

Daniel L. Brenner
Michael S. Schooler
Loretta P. Polk
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036-1903
(202) 775-3664

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